



**VIRGINIA ASSOCIATION OF REGIONAL
JAILS, INC.**

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-B204
Washington, D.C. 20554

Re: FCC Proceeding: Docket 12-375: In the Matter of Rates for Inmate Intrastate Calling Services, Second Notice of Proposed Rulemaking (FCC 14-158), Submitted Comments

Dear Ms. Dortch:

The Virginia Association of Regional Jails hereby respectfully submits comments on various aspects and paragraphs on and of the Second Further Notice of Proposed Rulemaking for FCC Proceeding 12-375.

The 23 jails that comprise the Virginia Association of Regional Jails service over half the jurisdictions of Virginia and house an equal percentage of the Commonwealth's pre-trial, pre-sentence and locally responsible inmates presently incarcerated. Since 1997, the Association has been extremely successful in seeking to promote progressive and responsible penological policies that make Virginia an example in safe, secure and humane correctional management.

While the Association seeks to be a constructive partner in addressing the concerns of all interested stakeholders and shares the Commission's commitment to "fair and equitable rates", there are several factors the Association believes deserve further discussion and consideration.

Foundationally, for the Jails of Virginia and indeed all jails, there are four fundamental principles that are the "*raison d'etre*" of every correctional agency and institution: Retribution, Deterrence, Incapacitation and Rehabilitation. Structurally, all four of these priorities have to managed and maintained for the jail system to be effective in the fulfillment of these objectives. A correctional agency cannot be successful in one facet without attempting to address them all. As such, it is within these parameters that the Association has concerns about the implementation of the Proposed Rule Making.

While the complexity of the dynamics associated with this market are considerable, the Association understands that as causes for action the Commission has highlighted five primary factors that compel the Commission, in their judgment, to take action: 1.) The effect of a reduction in inmate call rates/commission payments on recidivism; 2.) the fairness of existing inmate phone contracts; 3.) the failure of the “free market” to effectively operate and regulate; 4.) the negative implications of facility commissions; 5.) the provision of fair and equitable rate and fee structures.

General Comment #1 – *The effect of inmate call rates on recidivism*

While many if not most Commenters consistently assert a causal relationship between reduced call rates and a reduction in recidivism, it is the Association’s position that none exist. The Association is not aware of a single scientific study that substantiate a relationship between rates and recidivism. A general review of those assertions that maintain that connection reflect strictly anecdotal observations and are subject to interpretation.

The difficulties in assessing the “causes” of recidivism are structural and profound. In most circumstances, states do not consistently define recidivism in any cogent manner. ¹ As is true in any circumstance, to ascertain the reasons that someone didn’t do something is extremely difficult.

As described by a study performed by the PEW Center on the States on recidivism in America, “Readers are advised to use caution when comparing recidivism rates across states. A state’s recidivism rate is the product of numerous variables, and valid interstate assessments are possible only with careful study and analysis of the wide range of unique conditions affecting correctional agencies in each state”.² Obviously, this would infer that any attribution to a reduction in recidivism is extremely subjective and should be asserted with caution.

As a point of contrast, the study also concludes that any material reduction in recidivism comes from structural considerations associated with how an inmate’s incarceration is organized and defined. Factors associated with considerations like call rates reduction have been shown to not be material. Case studies performed in Oregon, Michigan and Missouri all reflect these factors of success and are hard to dismiss.³

¹ The PEW Center on the States, State of Recidivism, The Revolving Door of America’s Prisons, April 2011, Appendix: Methodology

² The PEW Center on the States, State of Recidivism, The Revolving Door of America’s Prisons, April 2011, Page 12

³ The PEW Center on the States, State of Recidivism, The Revolving Door of America’s Prisons, April 2011, Pages 20-23

As illustration of this dynamic, 67.8% of all inmates are arrested for a new crime within 3 years and 76.6% of all inmates will re-offend within 5 years.⁴

To the Association's knowledge, to date, there has not been any evidence based or longitudinal study of a prison system or individual jail that has reduced inmate call rates and has seen a subsequent reduction in recidivism.

It is the Association's position that any assertion of a causal relationship between call rate reduction and a reduction in recidivism lacks the necessary evidence based data to support consideration.

General Comment #2 – *Fairness of inmate call rates/commission rates*

The Proposed Rule Making and the many advocates who have contributed to this discussion have made many assertions as to the fundamental "fairness" of the current call rates. The Association understands those concerns but as with most things a more "in depth" assessment of that paradigm might be useful.

In many jurisdictions, with the exception of public education, local correctional expenditures account for more than any other local government operational line item. Virginia cities and counties provide approximately \$129,753,224 million dollars to support the regional jails of the Commonwealth.⁵ If all locally managed sheriff jails were included, the counties contribution would rise to \$404,955,889.00 million dollars.⁶

From these expenditures, in whole or in part, Virginia's regional jails provide free health care, free education, free legal assistance and free vocational, recreational, rehabilitative programs to inmates.

Historically, Virginia's facilities have used inmate call revenue to offset the costs associated with the provision of these services but has sought to balance those needs with the needs of the inmates and their families. On average, prior to FCC interim action, Virginia's regional jails charged only \$3.22 for a local inmate initiated debit 15 minute call and \$3.38 for a local inmate initiated collect 15 minute call.⁷ Rates of which exceed FCC interim rates by only \$.014 and \$.025 per minute respectively.

⁴ The U.S. Department of Justice, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005-2010, April 2014.

⁵ Virginia Compensation Board, 2012 Jail Cost Audit Report, aggregate survey.

⁶ Virginia Compensation Board, 2012 Jail Cost Audit Report, aggregate survey.

⁷ Virginia Association of Regional Jails, Inmate Phone Rate Study, 2014

Additionally, inmate initiated debit call usage continues to see a dramatic rise in Virginia's jails. As example, in the Northern Neck Regional Jail, inmate initiated debit calling accounts for 58% of call volume.⁸ This evolution makes inmate calling a base economic transaction comparable to the inmate purchase of a bag of potato chips. Significantly, this fact illustrates that in most instances the cost of an inmate calling his friends and family has the equivalent economic impact and associated opportunity costs of 3 candy bars. The significance of which does not objectively rise to the level of "unfair" or overly burdensome.

If the Proposed rule is enacted and citizens are required to subsidize call volume, the citizens of the cities and counties of the Commonwealth that comprise and fund jails would have to incur an additional \$13,500,000 million dollars in local tax burden to maintain status quo.⁹

Response and Comment on Paragraph 21: Restrictions on Payments to Correctional Facilities

Contrary to assertions of the Commission, the Association does not consider the payment of site commissions or the consideration of revenue in contract award as contributing to "the primary reason ICS rates are unjust and unreasonable".¹⁰

Quite the contrary, the Association regards the payment of site commissions and or the consideration of the same to be legitimate public policy discussion and by extension the basis for decision.

Inmate use of a telephone is not constitutionally guaranteed and that principle has been thoroughly tested in many federal districts across the country.

One case that illustrates this point involves a claim where Inmate W. Holloway, an inmate in the Arkansas Department of Corrections, contended that high phone charges violated his First Amendment rights because they prevented him from making as many calls as he would have liked. "A ten-minute interstate call costs \$10.43, plus taxes and any other governmental charges," said Steve Shults, one of Holloway's attorneys.

After a federal district court granted summary judgment to the prison system, Holloway appealed to the 8th U.S. Circuit Court of Appeals.

⁸ Securus Call Detail Report, Northern Neck Regional Jail, December 2014

⁹ Virginia Compensation Board, 2012 Jail Cost Audit Report

¹⁰ FCC Second Notice of Proposed Rulemaking, WC Docket No. 12-375, Paragraph 21

On Feb. 2, 2012 a three-judge panel of the 8th Circuit affirmed the lower court ruling against the inmate in *Holloway v. Magness*. The panel noted that the prisons had no obligation under the First Amendment to provide phone service at all. And, said the panel, “[j]ust as [Arkansas Department of Corrections] had no First Amendment obligation to provide any telephone service, it had no obligation to provide that service at a particular cost to users.”¹¹

Consistent with the previously referenced four guiding principles of corrections (incapacitation, deterrence, retribution and rehabilitation) a correctional facility has the moral and ethical responsibility to consider all factors that promote or advance all of these principles. It is important to recognize that one priority does not take precedence over the remaining three and that decisions of management have to be made within the totality of all four.

Within that context, there are many factors that may be indicative of a legitimate penological interest and may pre-empt the facility from considering inmate rates as the primary criteria in their deliberations.¹² These factors could include crime interdiction, deterrence, inmate management and yes, revenue generation.

As there is no right to a phone nor is there constitutional protection for costs an inmate or his family may incur, the inmate’s use of the phone and the costs associated therein have been and should be within purview of local public policy debate and should reflect the public policy priorities of the localities or states.

Limiting intrastate ICS commissions would infringe on the authority of localities/states to make legitimate public policy decisions about how best to fund their state and local correctional systems, promote effective deterrence, manage inmate populations, the development and provision of inmate rehabilitative programs. The proposed rulemaking would override legitimate constitutionally provided decisions of state and local elected officials about that funding and fulfilling policy mandates. The authority to make those decisions should remain with the states and localities, in the absence of any significant burden on interstate commerce or other compelling interest that justifies Federal preemption.

It is the position of the Virginia Association of Regional Jails that the abolition of site commissions or revenue share would be counterproductive to the provision of criminal justice, detrimental to inmate management and inappropriately interfere with the establishment of public policy.

¹¹ First Amendment Center, Vanderbilt University, David L. Hudson, First Amendment Scholar, February 12, 2012.

¹² Penological Interests – “interests that relate to the treatment (including punishment, deterrence, rehabilitation or incapacitation) of persons convicted of crimes.”, *Bull v City and County of San Francisco*, 2010 U.S. App. LEXIS 2684 (9th Circuit Cal. Feb. 9, 2010)

Response and Comment on Paragraph 27: Eliminating the Competition-distorting role of site Commissions.

The Commission has asserted that site commissions have undue influence on market distortions within price based markets. The assertion presupposes that the primary purpose of Agency procured ICS systems is to provide inexpensive inmate calling to the exclusion of all other considerations. A presupposition not based in application or supported by fact.

It is the position of the Association that site commissions do not distort market place competition as that individual unit costs are not the competitive decision point. The competition point that the marketplace effectively and appropriately delivers is one of aggregate value and utility. Though unit price is of intrinsic importance, it is but one factor of consideration in determining value and utility and should not supersede other considerations. Price considerations notwithstanding; ethics, public safety and fiduciary responsibilities require local facilities to evaluate the entire *value proposition*.¹³ In execution of this requirement the agency insures that all of its public service requirements are met.

It is the position of the Association that there is no distortion of competition; the market is effectively providing a competitive price point on value and utility; to a significant degree reflects exactly what is valued in the market; and cannot be evaluated outside the policy priorities of the community.

Response and Comment on Paragraph 29: Legal Authority

Historically, the Supreme Court has required Federal agencies asserting regulatory authority over business transactions within a single state to demonstrate that those transactions have a significant impact on interstate commerce. With regard to telecommunications, the FCC has traditionally drawn a line between interstate and intrastate calling, with regulation of the latter being left to state legislatures and regulatory commissions.

It is the position of the Association that inmate phone calls originating and terminating within the same state, and that incur only Virginia taxes and tariffs do not significantly impact interstate commerce. It is the Association's belief that the validity of this position is illustrated by the Federal Communication Commission imposition of the Universal Services Fund Tax only on those calls that fall within their accepted and traditional purview; interstate calls.

¹³ Financial Times, <http://lexicon.ft.com/Term?term=value-proposition>, 2014

"Customers face a choice when browsing a set of products and/or services at various prices. The value proposition is the additional benefits the customer receives from a product/ service not offered by other competitors. The value proposition is a combination of the product and/or service and the price charged."

Additionally, the Commission's assertion of authority references sections 276 and 201(b) of the Telecommunications of 1996, which in relevant part, section 276(b)(1) states:

" In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the enactment of the Telecommunications Act of 1996, that Commission shall take all actions necessary (including and reconsideration) to prescribe regulations that – (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone....^{106"14}

It is the position of the Association that the entire, in spirit and letter, aforementioned section of the Telecommunication Act of 1996, empowered the Federal Communication Commission to provide oversight to private sector telephone providers to the benefit of the general public.

Inmate ICS services are not a function of market driven economics but a reflection of public policy priorities which are not pre-empted by the Telecommunications Act of 1996 and constitutionally falls outside the authority of the Commission.

The FCC's assumption of this authority would, in a material sense, interfere with the lawful and appropriate oversight of state utility commissions to regulate intrastate commerce, and preempt constitutionally elected representatives in setting policy. Thereby, effectively rendering them powerless to perform their statutory duties and responsibilities.

Response and Comment on Paragraph 35: ICS difference from public payphones

It is the Association's position that inmate ICS services are not a function of market driven economics but of public policy and insofar that the phone service is provided to a correctional facility not to an inmate, inmates are not the general public and that Constitutional case law has established that an inmate does not have a constitutional right to a phone or a particular cost; ICS is dramatically different from previous FCC addressed payphone issues. Subsequently, as provided for in Federal court, jurisdictions should be provided considerable latitude in establishing policy as it pertains to intrastate inmate calling costs.

¹⁴ Telecommunications Act of 1996, Section 276(b)(1)

Response and Comment on Paragraph 39: Costs Incurred by Correctional Facilities

It is the position of the Association that there are significant incurred costs associated with the provision of inmate calling services and due diligence in the interest of public safety. These costs are both direct and indirect and some are not easily quantifiable.

The costs associated with service management, managing inmate IDs and accounts, responding to request for service, managing maintenance and repair could be considerable and directly impacts the facility's budget. Costs associated with the supervision required by officers to insure equitable use, though not easily accounted for is none the less considerable.

A primary cost associated with inmate phone services is all the costs necessary to insure public safety. This would include all efforts needed to interdict continuing criminal enterprise, prosecute criminal acts and maintain the safety, security and good order of the institution through phone call monitoring, recording, pattern analysis and provision to law enforcement and the courts.

A potential major increase in incurred costs that would be hard to project would be the unintended consequence of an increase in crime, criminal or disruptive activity that may result from the imposition of the proposed rule and its effect on call volume. While it is difficult to ascertain the impact of increase call volume on recidivism, its impact on continuing criminal enterprise would be easily quantifiable and should be anticipated.

Additionally, it is the Association's position that incurred cost calculations are dynamic and defy fixed assessment as budgetary and financial conditions change. In anticipation that the Commission will issue a rulemaking to limit intrastate calling rates, the Association urges the Commission to consider adopting a flexible cost accounting structure that would reflect changing facility conditions that could impact a facility's incurred cost profile.

Response and Comment on Paragraph 61: Tiered Rate Caps

It is the position of the Association, if the proposed rule is implemented, that tiered rate caps reflect structural and organizational realities that have a real and material impact on the provision of ICS services. In the aggregate, there are no economies of scale or efficiencies within a jail environment that would justify a unitary rate approach.

If implemented, tiered rate caps provide the greatest opportunity for stakeholder equity and utility.

Response and Comment on Paragraph 128: Transition Periods

Potentially unique, Virginia's regional jails are a political subdivision of their participating jurisdictions and are operationally their own separate fiscal agent. They promulgate and manage their own budgets, manage their own cash flows and balance sheets, can and do issue debt in the performance of their mandates. Operationally, the jails are funded in tri-furcated fashion: they receive funding from state, federal, local jurisdictionally charged per diems, state partial re-imbursement of salary expense; and revenue generated from business processes.

As locally developed budget and financial obligations are, in essence, multi-year financial instruments, the Association would ask that consideration be given to a phased approach to the implementation of any rate restriction/revenue share prohibition.

As revenue would still be needed and the transition managed, rate caps and commission restrictions should be synchronized to limit, to the maximum extent possible, local financial dislocation; promote effective and realistic planning involving property value assessment; propose tax increases and invite public comment and implement alternative funding.

It is the Association's position that a ninety (90) day transition for cap restrictions, that would operationally limit or otherwise restrict revenue generation during the overall transition period, to be unmanageable and would cause an undue burden on local government and the citizens they serve.

If the Commission were to take action on this issue, as the development of the aforementioned re-evaluation plan would take considerable time to provide a manageable transition, at a minimum, 2 year transition with funding at status quo would be required to successfully manage the transition to a low rate/no commission marketplace.

We appreciate being part of the process and the opportunity to make comment on this important and vital issue.

Respectfully submitted,

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Superintendent
Northern Neck Regional Jail
Chairman, Legislative Committee
Virginia Association of Regional Jails*